

*United States Court of Appeals  
for the Second Circuit*



**BRIEF FOR  
APPELLANT**



76-1564

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA

Plaintiff-Appellee

-against-

MARTIN ALLEN, ET AL.

Defendant-Appellant

-----X

Docket Numbers:

76-1564

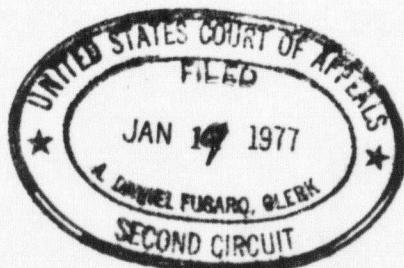
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BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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FOOTNOTES

H - refers to minutes of the hearing.

T - refers to minutes of the trial.

PRELIMINARY STATEMENT UNDER SECOND CIRCUIT RULE 28

The decision herein was rendered after a trial without a jury, before United States District Court Judge JACOB MISHLER on August 30, 1976.

STATEMENT OF THE ISSUES

The issues in this case are whether the guilt of the defendant-appellant was proven beyond a reasonable doubt as to the charges of attempted bank robbery and whether there was probable cause for the arrest of the defendant-appellant.

STATEMENT OF THE CASE

Vanessa Hodges, an unindicted co-conspirator, testified on behalf of the government that in return for her cooperation, she would be allowed to plead guilty to conspiracy on another charge of bank robbery for which the maximum penalty was five years.

Ms. Hodges admitted being the originator of the plan to rob the bank, testifying that she told Pia Longhorn, a friend of hers, that she wanted to meet someone who would rob a bank with her (10T). Pia Longhorn referred her to Martin Allen. Hodges and Allen met, at which time Hodges told him of her plan to rob the Manufacturer's Hanover Trust Bank. Hodges testified that their plan was to enter the bank on Monday morning at 7:30 a.m., when the bank manager arrived, and take the night deposit box (11T). Allen agreed to this plan and informed her that he possessed two sawed off shotguns and a .38 revolver (12T).

On Monday, June 14, Martin Allen, accompanied by Robert Jackson, who was driving, picked up Hodges at Pia Longhorn's house and the three then drove down to the bank. By the time they arrived, Hodges noticed that the bank was already open, so the three went to eat out in a restaurant (15T). After eating, at about 9:00 a.m., they rode back to the bank. When they arrived at the bank, they spotted the night deposit bags. Martin Allen, the defendant-appellant, indicated, he had another friend who could assist in the robbery (16T). After this discussion, Hodges and Allen returned to the car, which was around the corner from the bank, where Jackson was still sitting.

Jackson then got out of the car, took some cardboard, and wrote a license plate number on it (22T). Then the three rode around again, at which time Jackson removed the false plate because Allen said that they had to pick up his friend in Coney Island.

The three then drove to Coney Island, stopping in front of the projects on 33rd Street, where they met Scott on the street. Allen asked Scott if Scott wanted to participate in the robbery and Scott agreed (24T). Allen then went upstairs in the projects to get another shotgun, which brought the total number of guns in the car to two (26T). They returned to the bank, at which point Hodges observed that the bank was already crowded. Hodges said that Allen looked around the bank to see if he could locate cameras. Allen told Hodges that he noticed a camera over the door and returned to the car, where Hodges, Jackson and Scott were sitting. Allen told them about the camera, and then Scott went into the bank (27T). Scott returned to the car to tell them that the bank was in the process of separating the night deposit money. Hodges then suggested that they postpone the robbery until the following Monday (28T).

The four of them then returned to Coney Island but before they did, they stopped off at a hardware store to purchase stockings and some gloves. Hodges suggested they do this because this way, their faces and fingerprints would be covered up during the robbery (31T). They then returned to 33rd Street, where Jackson was dropped off.

Hodges, Allen and Scott then took a cab to Nostrand Avenue and separated there.

On June 18th, 1976, when Hodges was arrested on another robbery charge, she told agents about the bank robbery that was supposed to take place the following Monday (32T). Hodges testified that she told the agents that she and three others would be robbing the Manufacturer's Hanover Bank on Flushing Avenue in Brooklyn. Hodges then proceeded to provide the agents with descriptions of the three males. Hodges described Allen, saying, "he was short, dark skinned, and had hair on his face and looked like a monkey (33T)." Hodges said Scott, "was about 5'9", slim and had an afro, but something was wrong with his right eye." She said Jackson, "was light skinned and had a moustache and a cut on his lip." Hodges went on to describe the type of car, saying that it would either be a rust or gold colored, four door sedan. She said that the license plate would be covered with cardboard (33T).

Hodges called Allen on the phone on the Saturday before the robbery was supposed to take place. Hodges asked Allen if he was still planning to rob the bank and he said that he was. However, when Hodges spoke to Allen on Sunday, he said that he was not going through with the plan because he was aware of her arrest and was afraid that the F.B.I. would be watching (34T). After talking with Allen, Hodges called the agents to tell them that Allen said he would not rob the bank. Hodges said that she thought they still might go, but without her, because they thought Federal agents would be following her.

As a result of information from Vanessa Hodges, agents of the Federal Bureau of Investigation, at approximately 7:00 a.m. set up a surveillance team in Brooklyn, outside the Manufacturer's Hanover Trust Company at 210 Flushing Avenue on Monday, June 21, 1977. The information was that a brown vehicle would be used and that the vehicle would utilize a cardboard license plate (21H). The information utilized by the F.B.I. was based on information from an informant, Vanessa Hodges, who was never used by the F.B.I. on any previous occasion whose reliability was untested (23H).

At about 7:39 a.m., a four door medium brown Lincoln, black vinyl topped with a cardboard plate on the rear was observed (30H). The vehicle was moving in an Easterly direction on Flushing Avenue.

The vehicle parked on the Southeast corner of Washington and Flushing Avenues. A Black male, with a strange eye and a dungaree hat on his head, exited the vehicle. The Black male was observed walking in a Southerly direction with a cup of coffee in his hand. He re-entered the vehicle (34H). The Lincoln left the location where it was parked. It went West on Flushing Avenue to Waverly, stopped, backed up into Flushing and then the vehicle went East one block on Flushing and parked on the Southerly side between Washington and Waverly (35H).

The vehicle traveled Easterly on Flushing Avenue and South on Grand Street or Grand Avenue, at which time the vehicle was pulled over. The three occupants of the vehicle were placed under arrest. Observed in the rear seat after removal of the occupants, were a black and red plaid suitcase. In the suitcase, were two sawed off slide or pump action shotguns, along with a pair of handcuffs and a toy nickel plated revolver (66H). The suitcase and the items contained therein were seized.

The defendants were subsequently charged in a four count indictment with conspiracy in violation of Title 18, United States Code, Section 2113(a); attempted robbery of the Manufacturer's Hanover Trust, 210 Flushing Avenue on the 14th day of June, 1976 and on the 21st day of June 1976, in violation of Title 18, United States Code Sections 2113(a) and (2); and possession of firearms in violation of Title 26 United States Code Sections 5861(d) and 5871 and Title 18 United States Code Section (2).

The trial of the action was on August 30, 1976, without a jury, before the Honorable Jacob Mishler, Chief Judge, E.D.N.Y. and the defendants were convicted on all four counts.

POINT I

NO PROBABLE CAUSE EXISTED  
FOR THE ARREST OF THE  
DEFENDANT

Agents of the Federal Bureau of Investigation on June 21, 1976, participated in a surveillance of the Manufacturer's Hanover Trust at 210 Flushing Avenue based on information received from an informant before unknown to the F.B.I. and whose reliability had not been before corroborated.

The defendants did not at any time approach the bank and the lone individual who left the vehicle, in which the defendants were observed, went to a nearby store for an innocuous cup of coffee (34 H).

Unlike Draper v. United States 358 U.S. 307, where the informant was a reliable paid informer, in the instant case, the informant's reliability was untested and it could not be said that the information came from one who had always been found to be accurate and reliable.

In the instant case, all the agents had was mere suspicion. The fact the automobile was parked outside the bank taken together with the other activities that were observed was not enough of a showing that a crime was being committed in their presence.

The subsequent search does not make the arrest a good one because of the contraband recovered. A search is either good or bad at its inception and does not change character as a result of its success.

POINT TWO

THERE WAS A REASONABLE DOUBT  
AS TO THE DEFENDANTS GUILT UNDER  
COUNT TWO OF THE INDICTMENT

The defendant was charged with attempted robbery of the Manufacturer's Hanover Trust, 210 Flushing Avenue on June 14, 1976.

The only evidence presented with respect to that charge was the uncorroborated testimony of Vanessa Hodges, an accomplice. The testimony of Vanessa Hodges indicated that on the 14th day of June, 1976, the defendants proceeded to the bank on the morning of June 14th (28T) and again in the afternoon (30T).

They left the area of the bank and bought stockings to put over their faces and gloves to prevent fingerprints (31T).

The fact that the defendants subsequently purchased items that they deemed necessary in order to carry out the bank robbery is indicative of the fact that they were not prepared at the time the observations of the bank were made.

Further preparation was necessary and on June 14th after deciding they would not rob the bank, the defendant-appellants engaged in other acts of preparation.

Their activities on June 14th, 1976, did not amount to an attempt and as a result the guilt of the defendant-appellant was not proven beyond a reasonable doubt.

POINT THREE

THERE WAS A REASONABLE DOUBT AS  
TO THE DEFENDANT'S GUILT UNDER COUNT  
THREE OF THE INDICTMENT

The defendant was charged with attempted robbery of the Manufacturer's Hanover Trust at 210 Flushing Avenue on June 21, 1976.

The actions of the defendant-appellants were that of preparation and cannot be construed as an attempt. In *Mims v. U.S.* 375 F2nd 135, the defendant displayed a weapon and held it to the head of a prospective customer who was attempting to gain entrance to the bank. The present case differs in that no weapon was ever displayed nor did either defendant approach the bank.

*Rumfelt v. U.S.* 44 F2nd 134, dealt with an attempt whereby the defendant was clad in a mask and used a carbine to intimidate a hostage.

The defendant-appellants, Jackson, Scott, and Allen, had not committed the requisite overt acts as in *Rumfelt v. U.S.* to warrant a conviction of attempted bank robbery.

In *U.S. v. Bussey*, 507 F2nd 1096, the defendant went to the home of the manager in order to open the bank vault and rob the bank. The manager convinced them the vault had a time lock and could not be opened until a later time. The court held that the appellant's conduct met the test of, "an act tending toward the accomplishment and done in part execution of the design to

commit a crime exceeding an intent but falling short of an execution of it (U.S. v. Bussey, Ibid..)".

Unlike the cited cases, the defendant-appellant approached neither a manager, prospective customer or any other individual in order to use force, fear, or intimidation in order to gain entrance to the bank.

CONCLUSION

THE JUDGMENT OF CONVICTION  
SHOULD BE REVERSED.

Respectfully submitted,

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U.S. ATTORNEY

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